IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.957 OF 2003

Krishna Kunjaram Nair @ Pillai]
Aged 58 years.]
Indian Inhabitant of Mumbai]
Having permanent address at]
Alanthattill House, Temple Road] Appellant
Post : Pavvanur, Kannur District] (Original
Kerala State] Accused No.1)

versus

The State of Maharashtra] Respondent

Miss Rebecca Gonsalves, advocate appointed, for the appellant.
Mr.P.A.Pol, APP, for the State.

CORAM : D.G.DESHPANDE
SMT.NISHITA MHATRE, JJ.
DATED : JUNE 25, 2007.

JUDGMENT : [PER D.G.DESHPANDE, J]

1. Heard the learned advocate for the accused and learned APP for the State. This appeal is filed by the appellant - original

accused No.1 challenging his conviction under Section 302 r/w 34 of the Indian Penal Code by which he was sentenced to suffer imprisonment for life and fine of Rs.3000/-.

2. The learned advocate for the accused made only one submission and according to her in the background and the circumstances of case, the accused could not be convicted under Section 302 but he could at most be convicted under Sections 326 or 304 Part II of the Indian Penal Code. In order to appreciate her arguments, it is necessary to see the background of the case.

3. This accused along with absconding accused Mohanan Gangadharan Korkiparbhu @ G.K.Mohan were alleged to have committed a murder of Molan Codon Sunny Lazar (hereinafter referred to as "the deceased") aged about 49 years by assaulting him with bamboo stick and iron strip. Molan Codon Stalin Sunny, aged about 19 years, is the complainant in this case. He is the son of deceased. He lodged a complaint in Sakinaka Police Station on 14/8/1999. It is stated in the complaint that the complainant and his father were residing at Room No.12, Asha Housing

Society, Krishna Nagar, Safed Pool, Pipe Line, Sakinaka Mumbai as paying guests or tenant. At the relevant time one Velteni Pankaj, Krishna Pille (Nair), Velaydan and Gopal were also occupying the said room as paying guests or sub-tenants. Two days prior to the incident one unknown person, who was the friend of accused, came to reside there. But the accused did not inform to the father of the complainant about this fact.

4. On 13.8.1999 at about 10.30 pm, after taking his meal in the hotel, the complainant came back to his house. His father was sleeping on the ground floor. The complainant went on the loft to change his clothes and he saw that the friend of accused Krishna was sleeping there on the loft. Since the friend of the accused was not a paying guest, the father of complainant made enquiry about him with the complainant. The complainant told his father that he was the friend of the accused and was residing there since two days. The father thereupon insisted the accused to pay rent for the unknown person who was staying in the room for two days. The accused refused to give rent. The unknown person

had asked to go out of the room at that moment only. This annoyed the accused. The friend of the accused assaulted the father of complainant with iron strip (patti) and the present accused lifted bamboo stick which was lying in the corner of the said room and gave blow on the head of the deceased. The deceased father fell down and the accused and his friend ran away. It is in this background, the present accused came to be prosecuted. The evidence against him is that he has inflicted blow by bamboo stick only, whereas the absconding accused gave blow by iron strip.

5. The learned advocate for the accused, therefore, contended that if the injuries of the deceased are seen from the post mortem report (Exhibit 19), the deceased had a Contusion Lacerated Wound over Right Side of Chin, 3 x 0.5 cm and, as per Column 19 of the post mortem notes, the deceased had contusion occipital parietal and frontal region, fracture to skull over right parietal occipital region 13 cms. in length, left parietal 15 cms in length oblique 6 cm. As per the evidence of Dr.Nandkumar Chavan (PW 5) these injuries, in column No.19 of PM notes, could have been caused by hard and blunt

object such as bamboo, lathi, stone etc.

6. The learned advocate for the accused therefore contended that even as per the evidence of eye witness, who was the son of the victim, this accused gave blow by bamboo stick only, whereas absconding accused used iron strip (Patti). This has been specifically stated by P.W.1 Stalin Sunny Moolamkoden - the son of deceased, in para 4 of his evidence, where he has stated that present accused Krishnan took a bamboo and his friend i.e. unknown person took iron rod and both of them started assaulting his father on head.

7. Therefore, when two weapons were used, one is iron patti and another is bamboo stick, then it is iron patti that could be caused fracture of skull almost in all probabilities. Further looking to the background of the quarrel, there is no intention to commit murder at least on the part of this accused who has admittedly used bamboo stick only. Therefore, this case squarely falls under Section 304 Part II of the Indian Penal Code.

8. Regarding the sentence, the advocate for the accused contended that the accused is in jail since 14th August 1999 and was not on bail during trial at any time and, therefore, she prays that since the accused is in custody since more than 7 years and 10 months, his undergone sentence would be sufficient in the circumstances of the case. We, therefore, pass the following order :-

:ORDER:

Appeal is partly allowed.

The conviction and sentence imposed upon the appellant/accused under section 302 of the Indian Penal Code is set aside. He is acquitted of the charges. However, he is convicted under Section 304 Part II of the Indian Penal Code and sentenced to suffer imprisonment already undergone.

The appellant/accused should be set at liberty forthwith, if not required in any other case.

The appeal is disposed off accordingly.

[SMT.NISHITA MHATRE, J] [D.G.DESHPANDE,J]